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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1515

HENRY E. HOWELL, JR., *Appellant,*

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA, *et al., Appellees.*

On Appeal from the Supreme Court of Virginia

MOTION OF APPELLEE THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA TO DISMISS OR, IN THE ALTERNATIVE, TO AFFIRM

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Appellee The Chesapeake and Potomac Telephone Company of Virginia ("C&P"), pursuant to Rule 16 of this Court, moves and requests that the Court enter an order dismissing the captioned appeal or, in the alternative, affirming the decision of the Supreme Court of Virginia. In support of its motion to dismiss, C&P respectfully represents that:

1. A utility consumer, such as Appellant Howell, does not present a "substantial federal question"

by claiming that, due to constitutional infirmities and failure to follow "federal case law," intrastate rates prescribed for a regulated telephone company by a state utility commission are unreasonably high. Court Rule 16.1(b); *City of Los Angeles* v. *Public Utility Commission of California*, 359 U.S. 119 (1959).

2. Appellant Howell, an experienced attorney, failed to raise in either a timely or a proper fashion in the court below the constitutional and federal questions presented to this Court in the instant appeal. Court Rule 16.1(b).

In support of its alternative motion to affirm, C&P respectfully represents that the grounds urged by Appellant Howell for reversal of the Supreme Court of Virginia's decision are so manifestly lacking in merit as to require no need for further argument. Court Rule 16.1(c).

OPINIONS BELOW

The decision of the Supreme Court of Virginia is reported at 215 Va. 549, 211 S.E.2d 265 (1975). The decision of the State Corporation Commission of Virginia, which appears at pages 34 through 130 of the Appendix to the Jurisdictional Statement, is reported at 3 PUR4th 160 (1974).

INTRODUCTORY STATEMENT

This case involves an appeal by a utility consumer of a decision by the Supreme Court of Virginia affirming an order of the State Corporation Commission ("S.C.C."), pursuant to authority delegated to the S.C.C. by the Constitution of Virginia [1] and state stat-

[1] Va. Constitution Art. IX, § 2.

ute,[2] which authorized C&P to increase rates for intrastate telephone services.

The protracted proceeding before the S.C.C. produced a voluminous record containing numerous exhibits of highly technical financial and economic data and, in addition, several thousand transcript pages. Mr. Howell participated in the hearings, but he did not sponsor a single witness to support the various (and novel) positions that he advocated. Before the Commission and the Supreme Court of Virginia, he endeavored to advance his ratemaking theories through argument rather than on the basis of evidence.[3]

ARGUMENT

I. The Constitution and Statutes of Virginia, Not the Federal Constitution, Protect Appellant Howell as a Consumer from Unreasonably High Rates for Intrastate Telephone Services; and, Accordingly, the Instant Appeal Contains No Substantial Federal Question.

The Commonwealth of Virginia has adopted a pervasive scheme for the regulation of charges by telephone utilities for intrastate services. The Constitution and statutes of Virginia establish an agency (the S.C.C.) with the constitutional and statutory obligation to prescribe intrastate telephone rates that are "just, reasonable and fair."[4] Telephone Utility ratepayers claiming to be aggrieved as a consequence of an

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[2] Va. Code Ann. Title 56 Sec. 234 *et seq.*

[3] In his appeal to the Supreme Court of Virginia, Mr. Howell advanced sixteen separate assignments of error. 215 Va. at 551; 211 S.E.2d at 266-267.

[4] Virginia Constitution Art. IX, § 2; Virginia Code Ann., Title 56, Sections 235, 236, 237-241.

S.C.C. prescription of intrastate rates possess an absolute right of appeal to the Supreme Court of Virginia.[5]

Consumers of intrastate utility services receive protection against exorbitant rates by virtue of state laws such as exist in Virginia and not under the Fourteenth Amendment of the United States Constitution. Accordingly, a utility consumer challenging the disposition of substantive issues by a state utility commission does not raise the requisite "substantial federal question" to obtain appellate review in this Court. Court Rule 16.1(b).

City of Los Angeles v. *Public Utilities Commission,* 359 U.S. 119 (1959) is instructive. In that case, Los Angeles and other utility ratepayers alleged in an appeal to the California Supreme Court that the California Public Utilites Commission's authorization of telephone rate increases deprived subscribers of the Fourteenth Amendment guarantees against deprivation of property without due process of law and equal protection of the law. The California Supreme Court rejected the petition for review which, under California law, constituted a decision on the merits by the court. The utility consumers then appealed to this Court alleging the same constitutional infirmities. ("Jurisdictional Statement," Dkt. No. 656, October, 1958 Term, pages 2, 11; and, "Brief in Opposition to the Appellees' Motions to Dismiss," pp. 12-23).

This Court dismissed that appeal "for want of a substantial federal question." (359 U.S. at 119). The same reasons which compelled this Court to dismiss the Los Angeles petition of appeal in the *City of Los*

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[5] Virginia Constitutional Art. IX, § 4; Virginia Code Ann., Title 12.1, Section 39 and Title 56, Section 239.

Angeles case dictate dismissal of Appellant Howell's appeal in this case.

II. Due to Appellant Howell's Failure To Allege in the Court Below that the Commission's Decision Was Repugnant to Either the Constitution or Laws of the United States, This Appeal Should Be Dismissed for Lack of Jurisdiction.

The Supreme Court of Virginia, in affirming the S.C.C.'s intrastate rate decision, did not pass upon any federal constitutional or other federal question. This by itself creates the presumption that Appellant Howell failed to present such a question or did not present it in a proper and timely manner. *Street* v. *New York*, 394 U.S. 576, 582 (1969).

In the instant case, that presumption becomes inescapable fact. Not one single reference to the "Laws of the United States," to the "Constitution of the United States" or even to such phrases as "due process of law" or "deprivation of property" appears in Appellant Howell's brief to the Virginia Supreme Court. *Cf.*, 28 U.S.C. 1257(2). Even the lengthy excerpts from decisions of this Court scattered throughout Appellant Howell's brief did not contain so much as a fleeting reference to the federal Constitution.

Appellant Howell's reliance on several early decisions of this Court went no further than asserting that those decisions established "rules of law and statements of principle."[6] (*See*, Jurisdictional Statement, p. 9). Appellant Howell never attempted to elevate those prior decisions to the height of creating a con-

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[6] Moreover, his string of citations included references to prior decisions of the Supreme Court of Virginia as well as this Court. (*See e.g.*, Jurisdicitional Statement, p. 9).

stitutional or federal-law mandate binding on state ratemaking agencies.[7]

Mr. Howell, in short, never apprised the Supreme Court of Virginia that he was challenging the S.C.C.'s decision on the grounds that the contested rulings were "repugnant to the Constitution . . . or laws of the United States." That lack, coupled with the Virginia Supreme Court's understandable failure to pass upon any federal constitutional or federal law questions, deprives this Court of appellate jurisdiction in the instant case. 28 U.S.C. § 1257(2); Court Rule 16.1 (b); *Radio Station WOW* v. *Johnson,* 326 U.S. 120, 128 (1945).

III. As Appellant Howell's Questions Presented Are So Unmeritorious, No Need for Further Argument Exists and, if His Appeal Is Not Dismissed, the Court Should Affirm the Decision of the Court Below.

In his first argument, Appellant Howell cites and relies upon decisions of this Court which focused on the appropriate investment base to be used in assessing the reasonableness of prescribed rates.[8] However,

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[7] Appellant Howell, although appearing *in propria persona,* is no legal neophyte, but a lawyer with years of experience before trial and appellant tribunals.

[8] Each of the cases relied on by Appellant Howell involved a utility's claim that the return on its investment devoted to its jurisdictional operations resulted in unconstitutional confiscation of property. *Smythe* v. *Ames,* 169 U.S. 466 (1898) established that the "fair value" of property devoted to the rendition of public service must be considered in establishing a utility's property and that the state cannot prescribe unreasonably low rates for intrastate services simply because it deems profits derived from the carrier's interstate business excessive. *Smith* v. *Illinois Bell Telephone Co.,* 282 U.S. 133 (1930) and *Simpson* v. *Shepard* (Minnesota Rate Cases), 230 U.S. 352 (1913) centered upon the proper allocation of investment used in common to serve both intrastate and interstate operations between those two operations for purposes of establishing jurisdictional rates.

Appellant Howell's first question in the instant appeal does not deal with establishing the appropriate intrastate investment, but with the method employed by the S.C.C. in developing C&P's cost of equity and overall cost of capital.[9] Unquestionably, the portion of C&P's total investment devoted to its intrastate operations was used by the S.C.C. in determining the Company's revenue requirements. *See,* 215 Va. at 558, 211 S.E.2d at 271.

As to the criteria for determining the cost of capital, the seminal decisions of this Court are *Bluefield Water Works & Improvement Co.* v. *Public Service Commission,* 262 U.S. 679 (1923) and *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U.S. 591, 603 (1944). Appellant Howell does not mention either decision. His arguments simply cannot pass muster under the standards established by the Court in *Bluefield* and *Hope.*

Appellant Howell has not and cannot demonstrate that the S.C.C.'s treating C&P as a "miniature Bell System" and use of the cost of capital for the American Telephone and Telegraph Company ("AT&T") as the appropriate benchmark for determining its wholly-owned subsidiary's, C&P's, cost of capital created an unjust and unreasonable end result as a matter of law:

> " . . . the Commission [is] not bound to the use of any single formula or a combination of formulae in determining rates . . . Under the statutory standard of "just and reasonable" it is the result reached not the method employed which is con-

[9] As Appellant Howell correctly points out the standard utlilized by S.C.C. to determine the cost of capital for an AT&T subsidiary is generally followed by state regulatory commissions nationwide.

> trolling. [citation omitted] It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end." [320 U.S. at 602].

In his second question dealing with inclusion of "customer deposits" and "investment tax credits" in C&P's rate base, Appellant Howell overlooks two decisionally significant facts; (1) customer deposits are not cost-free capital contributed by customers, but bear an interest cost of 6%;[10] and (2), deducting the unamortized portion of investment tax credits from the rate base (in addition to amortizing the credits over the life of the plant so that subscribers who actually use the plant receive the benefit) would discord with the intent of Congress on pre-1972 credits[11] and, with respect to post-1972 credits, result in the Internal Revenue Service prohibiting C&P from declaring investment tax credits for federal tax purposes. Internal Revenue Code § 46(e)(2).

CONCLUSION

For the reasons stated, the captional appeal should be dismissed or, in the alternative, the decision of the

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[10] Both the Commission staff accounting expert and the Company accounting witness testified that the intrastate investment rate base did not contain any cost-free contributions. The S.C.C. recognized that deposits are like any other debt capital of C&P—C&P must pay interest on the deposit and the debt (deposit) must be ultimately liquidated. (3 PUR4th at 170-171; Appendix to Jurisdictional Statement pp. 75-76).

[11] See, H.R. Rep't No. 749, 88th Cong., 1st Sess., pp. 38-39 (1964); H.R. Rep't No. 2508, 87th Cong., 2nd Sess., p. 83 (1962).

Supreme Court of Virginia affirmed without further argument.

Respectfully submitted,

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